APR 29

No. ~~1004~~ 63

In the Supreme Court of the United States

OCTOBER TERM, 1940

THOMAS W. WHITE, ET AL., FORMER COLLECTORS OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, PETITIONERS

v.

WINCHESTER COUNTRY CLUB

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

WINCHESTER COUNTRY CLUB

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Thomas W. White, Joseph P. Carney, and Thomas B. Hassett, Former Collectors of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled cause on January 30, 1941.

OPINIONS BELOW

The opinion of the District Court (R. 59) is reported in 30 F. Supp. 142. The opinion of the Circuit Court of Appeals (R. 117) is reported in 117 F. (2d) 146.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 30, 1941. (R. 121.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether amounts paid to the Winchester Country Club for certain so-called "privileges" constitute "dues or membership fees" subject to the tax imposed by Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928.

STATUTES AND REGULATIONS INVOLVED

The applicable statute and regulations will be found in Appendix A, *infra*, pp. 9–12.

STATEMENT

During the period from November 27, 1931, to January 9, 1935, the Winchester Country Club collected from its members and paid to the Collectors of Internal Revenue then in office amounts totaling $18,555.63 as a tax on "dues or membership fees" under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928. (R. 12, 13, 38–39, 52.) This amount represents a 10 percent tax upon payments made for "Dues, Privileges and Fees"

designated in the Club's by-laws of 1929 as follows (R. 15–16, 41–42, 55):

Annual Dues	$9,344.38
Full Privileges and Limited Privileges	7,432.25
Family Privileges:	
Limited Privileges	1,697.00
Tennis Privileges	53.00
Full Privileges for sons between 21 and 25 years of age	29.00
	18,555.63

There is no dispute as to the amount of $9,344.38 representing the tax upon "Annual Dues". The Club, however, brought suit to recover, on behalf of its members, the balance of $9,211.25, which is the amount of tax imposed upon the payments made for the so-called "Privileges". The question is whether such payments are "dues or membership fees" within the meaning of the statute.

The by-laws of the Club indicate the nature of the various payments referred to. Prior to 1929, the Club had Class A and Class B memberships. The former included golf privileges and cost $75. The latter excluded golf privileges and cost $40. (R. 62.) New by-laws were adopted in 1929 and were in effect during the years in which the taxes in controversy were exacted. The 1929 by-laws provided for "Annual Dues" of $50, which entitled the member to all the privileges of the Club except golf. In order to acquire the additional right to play golf at any time, a member was required to pay an additional $50 for "Full Privileges". A limited right to play golf at any time "except on

Saturday afternoons, Sunday mornings and holidays during April, May, June, September, October, and November" could be acquired by the additional payment of $35 for "Limited Privileges'. (R. 66.) All but a small portion of the Club's members acquired either limited or unlimited golf privileges.

Prior to 1929, Class A members (whose dues were $75) could purchase "Associate Memberships" for others. Class B members (whose dues were $40) could also purchase "Associate Memberships" for others but the prescribed payments were larger than were required of Class A members. (R. 62.) The 1929 by-laws included no express designation of "Associated Memberships." However, various golf, tennis and house privileges known as "Family Privileges" could be purchased by a member for members of his family. And members who had not acquired golf privileges (i. e., Full Privileges or Limited Privileges) were required to pay larger fees for "Family Privileges" than were members who possessed golf privileges. (R. 66, 67.)

The club year began January 1st. (R. 68.) By its by-laws "dues and fees" were payable on March 1st (R. 67), and it was the practice to bill members during March for "dues" and "privileges" for the coming year. (R. 69.) No particular formality was necessary in order for a member to acquire "privileges" either for himself or for his family. The practice was to let the officers know either in writing or orally what privileges were wanted. (R.

69.) If privileges were requested prior to August 1st, the member was billed for the full year; if requested after that date he was billed for a half a year. (R. 109.)[1] If no word had been received from a member as to the privileges desired, he was billed for the same privileges that he had previously held. However, he could thereafter notify the Club that the privileges were not desired and no attempt was made to collect the amount billed for privileges. (R. 69.)

After a claim for refund of $9,211.25 had been duly filed and rejected (R. 13–14), the Club on behalf of and under individual authorizations from its members (R. 4, 33–34, 48) instituted suits against the three Collectors of Internal Revenue to whom the taxes had been paid for the recovery of that amount. The District Court entered judgments for the Club. (R. 31, 45, 58.) A consolidated appeal was taken, and the Circuit Court of Appeals for the First Circuit affirmed the judgments of the District Court. (R. 121.)

REASONS FOR GRANTING THE WRIT

The decision of the court below in this case is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Merion Cricket Club* v. *United States*, decided March 28, 1941, not yet officially reported but reprinted as Appendix

[1] The by-laws provided that "any member elected after August 1st shall pay one-half of the annual dues and fees." (R. 68.)

B, *infra*, pp. 13-22. In the *Merion* case the by-laws provided for ten classes of membership, and with dues at varying amounts. Members who desired to play golf were required to pay an additional annual fee which varied from $30 for members under 21 to $110 for male members over 21. The golf privilege could be terminated by notice before the end of the year, and if not so terminated the member became liable for another year's fee. The Club challenged the Commissioner's action in taxing the amounts paid for "golf privileges" as "dues or membership fees". The Circuit Court of Appeals for the Third Circuit sustained the tax. Judges Clark and Jones delivered opinions supporting the tax and Judge Maris dissented.

Judge Clark expressed the view that any payment which entitles the member to the use of a common facility of the club over a period of time must be treated as dues if the amount of the payment is not dependent upon actual use of the facility but represents instead a general apportionment of the cost of maintaining and operating that common facility. He declared that the decision of the First Circuit in the present case, which emphasizes the recurring certainty or uncertainty of payment, "lacks logic". Judge Jones concurred because "the payments were made in discharge of a yearly obligation * * * which recurred so long as the member chose to enjoy, by failing to renounce prior to December 31st, the golf privileges for the

ensuing year and in a sum arbitrarily fixed by the club without regard to whether the privileged member used the golf facilities much, little, or not at all".[2] Judge Maris, dissenting, viewed the facts in the present case and in the *Merion* case as "substantially similar" and thought that the decision below in the present case should be followed.

The difficulty of administering the revenue measure in question, in view of this diversity both of result and theory, is readily apparent.[3] A ~~definite~~ decision by this Court is therefore desirable. Counsel in the *Merion* case advise that they intend to petition for certiorari, and, if the present petition is granted, the Government will not oppose a petition in the *Merion* case.

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[2] Judge Jones thought the present case distinguishable because "there the privileges 'could be taken and dropped informally at pleasure.'" This distinction, turning on the strictness or formality with which a club is administered, seems, in the language of Judge Clark, but "a further confusing refinement".

[3] In addition to the case at bar and the *Merion* case reference may also be made to *Foran* v. *McLaughlin*, 59 F. (2d) 158 (C. C. A. 9th), certiorari denied, 287 U. S. 637; *Weld* v. *Nichols*, 9 F. (2d) 977 (D. Mass.); *Baltimore Country Club* v. *United States*, 7 F. Supp. 607 (D. Md.); *Williamson* v. *United States*, 12 F. Supp. 26 (W. D. N. C.); *Hardt* v. *McLaughlin*, 25 F. Supp. 684 (E. D. Pa.); *Philtdelphia Cricket Club* v. *United States*, 30 F. Supp. 141 (E. D. Pa.). The last two cases, decided by the same judge but reaching opposite results, illustrate the present uncertainty and indefiniteness of the meaning of the phrase "dues or membership fees".

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.

APRIL, 1941.

APPENDIX A

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 413. CLUB DUES TAX.

(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(b) Such taxes shall be paid by the person paying such dues or fees.

"(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or university. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assessments, but shall pay no tax upon the amount paid for life membership.

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees', includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned." (U. S. C., Title 26, Secs. 950, 951, 952.)

Treasury Regulations 43 (1928 Rev.):

ART. 40. *Dues or membership fees.*—The Revenue Act of 1928 imposes a tax of 10 per cent on any amount paid as dues or membership fees, including all assessments (and also including penalties incurred by failure to pay promptly), to any club which is within the terms of the act: *Provided*, that the dues or fees, including all assessments (but not including penalties incurred by failure to pay promptly), of an "active resident annual member" of such club are in excess of $25 per year. "An active resident annual member" is a member who is neither a life nor a nonresident member, but who, in other respects, enjoys full club privileges, as distinguished from the restricted privileges enjoyed by a person holding an associate or other partial membership.

The term "dues" is defined by the act as including any assessment, irrespective of the purpose for which made. Therefore, assessments for capital expenditures will not be exempt from tax when paid on and after June 29, 1928, provided the sum of the assessments and dues to be paid by active resident annual members exceeds $25 per year.

Thus in the case of a club or organization the regular dues or membership fees of which are less than $25 a year, but which levies an assessment on its active resident annual members, if the regular dues or membership fees, plus the assessment, exceed $25 per year, the tax is applicable. The tax would likewise apply in the case of a club or organization which collects no regular dues or membership fees but meets its expenses by levying assessments on its members as funds are required, provided, of course, the assessments aggregate more than $25 per year for members who enjoy the full privileges of the club or organization.

Where the dues or membership fees, including assessments, determined in the manner herein outlined, of an active resident annual member are in excess of $25 per year, dues or membership fees paid by other classes of members, whether or not they are in excess of $25 per year, are subject to the tax. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the act, and therefore not taxable.

Examples— * * *

(5) A certain golf club has two classes of members. Class A members pay $40 per year dues and are entitled to the full privileges of the club, including the use of the golf course. Class B members pay $25 per year dues and are entitled to the privileges of the clubhouse, but do not enjoy the privilege of the golf course. The total dues of $40 paid by class A members are subject to tax, and, since the dues of such members are in excess of $25 per year, the dues of

$25 paid by class B members are also subject to tax.

(6) A certain golf club charges a "green" fee of $1 for each guest that uses the course. Such a fee is not paid "as dues or membership fees," and is, therefore, not taxable as such.

* * * * *

(8) A tennis club in which the annual dues are $25 levies an assessment of $2 per year on each member to cover cost of tennis balls. The dues, fees, and such assessments paid by members of this club are taxable.

* * * * *

APPENDIX B

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

No. 7441. October Term, 1940.

MERION CRICKET CLUB, PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES; FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPINION.

(Filed March 28, 1941.)

CLARK, *Circuit Judge.*

Some, at least, of the "leisure activities" said to be characteristic of a club [1] seem to have been devoted to tax litigation. So we find the member-taxpayers taking a broad view of the scope of "pleasure, recreation, etc." [2] and a narrow view of the meaning of "initiation fees" and "membership dues and fees". They first whittled at initiation

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[1] Clubs, 3 Ency. of the Social Sciences, pp. 573–577.

[2] Internal Revenue Code, 26 U. S. C. A. 1940 ed. Sec. 101 (9); What is a social club within statute imposing tax on dues or membership fees, 80 A. L. R. 1296; Construction and application of provision of income tax statutes exempting Clubs, 130 A. L. R. 107; Taxation of Individuals as Members of Social Clubs, 26 Virginia Law Review 941 (note), sub-heading, Social Sporting or Athletic Club?, at page 942.

fees.[3] Next, they succeeded in exempting assessments.[4] Clubs responded to this by lowering dues and increasing assessments. So the device did not affect their economy, but did effect a tax saving. Congress naturally plugged both leaks.[5]

The principal case is one of a series arising out of their third move. Having failed to tip the anti-tax balance by calling dues assessments, they now wishfully call them "commuted greens fees". In other words, the general dues are still lowered but the resulting deficit is met by the creation of a "playing membership". We may say that this second method of distributing operating costs has received the cooperation of considerable judicial hair-splitting. There are many decided cases and they may be found collected in 13 Words & Phrases 599 and (Supp.) 33 and 3 Prentice-Hall Federal Tax Service, 1940, Para. 29,544, and cited and discussed in two excellent law review notes.[6]

It is clear that Congress might well have taxed any payments to clubs. Such an excise would be the simplest kind of a tax on the sale of luxuries.[7] On a principle of de minimis and probably to save accounting intricacy, it selected the larger and more

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[3] *Masonic Country Club* v. *Holden*, 18 F. (2d) 553.

[4] *Garden City Club* v. *Corwin*, 62 F. (2d) 246. Cf. *Fresh Meadow Country Club* v. *U. S.*, 17 F. Supp. 400, 401.

[5] Internal Revenue Code, 26 U. S. C. A. 1940 ed. Sec. 1712 (a) and Sec. 1712 (b).

[6] Taxation—Federal Excise Tax on Club Dues or Membership Fees, 24 Minnesota Law Review 713 (note); Taxation of Individuals as Members of Social Clubs, 26 Virginia Law Review 941 (note).

[7] Green, Theory and Practice of Modern Taxation (2d ed. 1938) 196.

easily detectable. These are: "initiation fees", "assessments", and "membership dues and fees". As the term "dues" has been long in use in this country (the corresponding word in England is "subscription"[8]), it might well be said to have acquired a "trade usage". So testimony on that meaning might have been offered.[9] It has not been presented either to us or, so far as we know, to any other court. We think, however, that it sufficiently appears from the "common ground" of the sociological and legal structure of social clubs. The latter has been adverted to in the text books and essays.[10]

The name itself is significant. It derives from the Anglo-Saxon "cleofan" and indicates a division of the reckoning.[11] The theory is one of joint expenditure.[12] Some clubs carry this theory to its logical conclusion and divide the entire cost of running the club among the whole membership. The glutton and toper eat and drink at the expense of their more abstemious brethren. The more ath-

[8] *Wise* v. *Perpetual Trustee Co.*, 1903 A. C. 139, 149; *Carlisle and Silloth Golf Club* v. *Smith*, 1912, 2 K. B. 177, 189–190; aff'd 1913, 3 K. B. 75, 82–83.

[9] Wigmore on Evidence (3d ed.) Sec. 1955; 9 Wigmore on Evidence (3d ed.) Sec. 2556.

[10] "It is well known that clubs exist which limit the number of the members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of many conveniences which the members enjoy." 4 Amer. Jur. p. 457.

See also Escott, Club Makers and Club Members.

[11] "The word signifies uniting to divide", Timbs, Clubs and Club Life in London, p. 2.

[12] Timbs, above cited, p. 4.

letic or enthusiastic golfer lives off his weaker or less zealous colleagues. Most clubs, however, do not carry this companionship idea to such lengths of sharing. They except and apportion to the particular recipients certain supplies and services. What remains comes from the members generally and the names and forms of their payments have always been those of "initiation fees" and "dues". It behooves us, then, to examine the basis of the difference and so to determine the distinction.

Club facilities may be for common and repeated use or they may be for single and individual enjoyment. It is possible, although difficult, and may be unjust cost accounting (i. e. per divot) to divide that common use among the users. Such a division overlooks one element. The facility must be available irrespective of use (this applies to certain categories, perishables for instance, of the individual and single). For that reason, the apportionment must be general and cannot be allotted. A golf course is just as typical as a club-house. You consume a drink and you enjoy the special attention of a caddy, but you share the use of fairways that always await anxiously for your drives.

The argument for the "commuted green fee" is then an attempt to extend a false analogy by disguised phrasing. The green fee is not an attempt to charge the appropriate fraction of a general cost. It is an arbitrary amount billed to non-members for the privilege of playing. Its character has

been well described by a judge speaking in the home of golf. He says:

> "* * * The revenue of the committee is to consist—in addition to a fixed contribution of 6s. per member payable by the golf clubs and a similar fixed charge payable by residents who use the links for playing golf—of fees levied on visitors and members of the general public who use the links for the game." *Carnoustie Golf Course Committee* v. *Commissioners of Inland Revenue*, 1929 S. L. T. 366, 368–369.[13]

It is, in fact, more closely related to calendar than to cost.[14] Obviously nothing is added to an inaccurate description by the application of the common term for a collective payment.

The cases have attempted a further confusing refinement. They suggest some budgeting principle. It is easier to run a club, or anything else for that matter, if one can dispense with prophecy. The courts have allowed this greater ease to assist not only the managers but the taxpayer-members, and have made exemption turn upon recurring cer-

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[13] Cf.:

"* * * It is said that the green fees alone would not nearly keep up the course and the club-house which the visitors enjoy, nor would the members' subscriptions without the visitors' green fees keep up the course and the club-house; that in either of those aspects the club would every year have a heavy deficit. By combining the two there is a less deficit, though there is still a deficit, because the difference between the receipts and expenditure has to be made good by members' subscriptions." *Carlisle and Silloth Golf Club* v. *Smith*, 1912, 2 K. B. 177, 189–190.

[14] It is common knowledge that most golf clubs scale their green fees according to the probabilities of congestion.

tainty.[15] Such a view lacks logic. The budget would be even more assisted by life memberships or by deposits to cover the purchase of consumables. Furthermore, the club with the best crystal-gazers or the most loyal members would escape the most taxes. In point of fact, the principal case falls inside even the questioned classification.

The judgment of the District Court is affirmed.

JONES, *Circuit Judge*, concurring.

I concur in the affirmance of the judgment below for the defendant. The learned trial judge, before whom the case was tried without a jury, based his action upon a ruling of the same court in *Hardt* v. *McLaughlin*, 25 F. Supp. 684, where the material facts involved were precisely the facts of the instant case.

The opinion in the Hardt case correctly construed the pertinent provision of the Revenue Act[16] with respect to the tax on club "dues or membership fees" and applied the statute to a proper appraisal of the character of the payments made by the club members for golf privileges. The payments were made in discharge of a yearly obligation (payable semiannually) which recurred so long as the member chose to enjoy, by failing to renounce prior to December 31st, the golf privi-

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[15] Contrast: *Winchester Country Club* v. *White*, 30 F. Supp. 142, aff'd, 117 F. (2d) 146; *Philadelphia Cricket Club* v. *U. S.*, 30 F. Supp. 141; *Foran* v. *McLaughlin*, 59 F. (2d) 158 cert. denied, 287 U. S. 637; *Hardt* v. *McLaughlin*, 25 F. Supp. 684.

[16] Sec. 413 of Revenue Act of 1928, c. 852, 45 Stat. 791, 26 U. S. C. A. Int. Rev. Acts, p. 441.

leges for the ensuing year and in a sum arbitrarily fixed by the club without regard to whether the privileged member used the golf facilities much, little, or not at all. The charges were dues or membership fees in the ordinary acceptation of those terms and, therefore, within the intent and meaning of the statute. In that situation, the club's by-laws and regulations, even though promulgated long before the enactment of the particular Revenue Act, are ineffectual to exclude the payments from the purview of the tax statute.

The case of *White* v. *Winchester Country Club*, 117 F. 2d 146 (C. C. A. 1), takes away nothing from the decision in the Hardt case. The opinion in the White case expressly points out (p. 148) that there the privileges "could be taken and dropped informally at pleasure" as distinguished from the "recurring contractual obligation" in the Hardt case, whose pertinence to the facts of the present case has already been pointed out.

MARIS, *Circuit Judge*, dissenting.

I regret that I cannot concur in the conclusion reached by the court in this case. The question before us is whether annual golf fees collected by the Merion Cricket Club from those of its members who desire the privilege of playing golf on the club's courses are taxable under Section 1710 of the Internal Revenue Code (26 U. S. C. A. Sec. 1710) as amounts paid "as dues or membership fees to any social, athletic, or sporting club." The Merion Cricket Club is a social and athletic club. It has ten classes of membership and for each class membership dues are fixed by the by-laws. Mem-

bers of all the classes, except Playing Members (who do not have golf privileges), are given the privilege of playing golf for an annual fee, payable in semi-annual installments. The fees varies from $30 for members under 21 to $110 for male members over 21 and its amount does not depend on the class of membership to which the member belongs. The golf privilege can be terminated by notice before the end of any year. If not so terminated the member becomes liable for another year's fee. This method of charging members for the privilege of playing golf has been in effect since 1896.

The question turns upon the meaning to be given to the statutory terms "dues or membership fees." While these are words in common use and are not defined in the statute a number of federal courts have had occasion to consider them and have indicated some limits to their meaning. Thus to be club dues or membership fees it has been held that payments by club members must be based upon membership in the club and must be payable by all members of a particular class of membership, not merely by those of the class who elect to make use of a special club facility. *Weld* v. *Nichols*, 9 F. 2d 977; *Baltimore Country Club* v. *United States*, 7 F. Supp. 607; *Williamson* v. *United States*, 12 F. Supp. 26; *Philadelphia Cricket Club* v. *United States*, 30 F. Supp. 141. Then also, they must represent a recurring, contractual obligation extending over an indefinite period of time. *Foran* v. *McLaughlin*, 59 F. 2d 158, cert. den. 287 U. S. 687.

The golf fees involved in this case do not meet these tests. They are not incident to any class of membership. On the contrary they are payable only by those members, of whatever class, who desire to

make personal use of the golf facilities of the club. Nor are they indefinitely recurring obligations. While annually renewable in the absence of notice, the accrual of the obligation is entirely within the individual member's power. If he does not wish to make use of the golf facilities in the new year he may by notice to that effect divest himself of all responsibility for future golf fees. This, it seems to me, is inconsistent with the statutory concept of dues and membership fees.

In *White* v. *Winchester Country Club*, 117 F. 2d 146, the Circuit Court of Appeals for the First Circuit, upon facts substantially similar to those here involved, reached the conclusion that annual payments to a country club for golf privileges were not taxable as "dues or membership fees." That conclusion is in accord, as I have indicated, with the views of all the courts which have considered the subject except the court below in the present and a prior related case (*Hardt* v. *McLaughlin*, 25 F. Supp. 684). The case of *Foran* v. *McLaughlin*, *supra*, upon which the government relies, is not to the contrary, for the monthly greens fees held taxable in that case were a recurring contractual obligation of those members of the Olympic Club who joined the class of Contributing Members which obligation extended over an indefinite period of time regardless of the members' desire to use the greens. They were obligations incidental to the class of membership and were, therefore, properly taxable as membership fees.

The golf fees of the Merion Cricket Club which we are considering were provided for in 1896, long before any tax on club dues was proposed. Neither tax evasion nor avoidance is involved. Being con-

vinced that these fees are charges for the personal use of a special facility of the club and that they are not membership fees I cannot agree that the judgment holding them to be taxable as the latter should be affirmed.

A true copy:

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE 1941